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In The

Supreme Court of the United States

October Term, 1993

NELL D. AUTERY, as Administratrix of the Estate of ROY FRANKLIN AUTERY, deceased, and CHARLOTTE SCHREINER,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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REBUTTAL STATEMENT OF FACTS

Petitioners wish to convey two points. First, petitioners have attached photographs (in the appendix to this reply) which depict the proximity of the tree-line to the roadway where the subject accident occurred. These photographs give perspective to the evidence which established that the subject tree was located only forty-five (45) feet from the roadway when it fell. The close proximity of the tree takes on greater significance when considered in light of the evidence that this tree had half its bark missing for perhaps as long as *twenty years* prior to this accident.[1] Despite the THMP's requirement for annual, on-foot, walk-around inspections of *all* trees within a distance of "twice the average tree height" (Pet. App. E at 62a-64a), this tree went undetected for many years.

Second, the government contends (Br. at 8) that petitioners are "wrong on the facts" in asserting that the THMP required a walk-around inspection at the sight of a black locust tree within striking distance of a heavily used roadway. This is simply not the case. The THMP required on-foot, walk-around inspections in the area two

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[1] The district court noted that plaintiffs' tree expert, Tim Johnson, testified that "the portions of the tree he examined after the accident had a large exterior portion of decay." R2-64-17. Mr. Johnson testified that *half its bark was missing*. R3-150-51. The government's expert, Dr. William Sites, ascribed the damage to "1) fire or 2) another tree falling against them, or 3) by limbs being broken off during storms, ice or snow; or perhaps a combination of these." Plaintiffs' Exhibit n-10; R3-38. Plaintiffs' expert opined that these injuries occurred *twenty years earlier*. R4-144. Both Dr. Sites and Mr. Johnson testified that the tree's decay evidenced itself on the tree's exterior and was visible upon inspection. R2-64-17; R3-148-50.

times the average tree height from areas of heavy visitor use. This tree was seventy feet tall. Assuming it was of average height (the photographs bear this out), then the THMP required inspections one hundred forty feet from the shoulder. Conversely, since this tree was forty-five feet from the highway, the average tree height would have had to have been less than twenty-two and one-half feet for *this* black locust to fall outside the mandatory annual inspection area. The photographs equally *disprove* this contention.

The Park Services' safety and concessions manager, Clarence Rice, acknowledged that the Park Service performed annual inspections in the areas of heavy visitor use. Plaintiffs' Exhibit H at pp. 35-6; R3-38. In fact, the Park Service removed approximately nine hundred hazardous trees per year from the areas of the heavy visitor use, R3-117-121, and other trees were cut in the immediate vicinity of this subject tree. R3-205; plaintiffs' Exhibit I at pp. 11 and 43.

ARGUMENT

I.

The petition for a writ of certiorari was docketed on October 26, 1993. The government received *five* extensions of time for submission of its reply (two ostensibly because of ongoing settlement negotiations). Despite six months with which to formulate its response, the government's brief fails to address the fundamental issue presented: Whether the Park Service's THMP was sufficiently specific and mandatory to deprive its employees of discretion to not inspect for hazardous trees adjacent to the Park's most heavily travelled highway.

Nowhere does the government tackle how the Park's employees could have any discretion *to not act* when the THMP specified *who* was to inspect, *what* was to be inspected, *when* the inspections were to occur, *where* the inspections were to take place, and *how* they were to be done.

The government simply condemns as "inapposite" the cases petitioners cited from other circuits (Pet. at p. 13, n. 6) which found no discretion where regulations and policies far less stringent than those here were involved. Br. at 13. Actually, those cases go to the heart of the issue.

By requiring that the THMP "compel park employees to inspect certain trees on certain days or remove a particular number of trees per week", App. B at 17A, the Eleventh Circuit requires far more specificity and a greater mandate for day-to-day conduct in governmental regulation or policy than the Eighth[2], Ninth[3] or

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[2] *Appley Bros. v. United States*, 7 F.3d 720 (8th Cir. 1993), *see*, discussion, n. 9, *infra*; *see*, also *McMichael v. United States*, 856 F.2d 1026 (8th Cir. 1988) (Government inspector's safety checklist required inspector to shut down munitions plant in event of an electrical storm; Government not immunized by discretionary function exception for failing to order evacuation when electrical storm occurred); *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986) (Agency's failure to elevate power lines not protected by discretionary function immunity when agency's own safety policy expressly required it to "raise its power lines if they constitute[d] a safety hazard").

[3] *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991) (No immunity for contracting officer required to report absence of fall protection to contractor and give notice that corrective action needed under Federal Acquisition Regulations incorporated within construction contract.

Tenth[4] Circuits require. By immunizing conduct which is at best "judgment guided purely by scientific or other objective principles", the Eleventh Circuit ignores the lesson of *Berkovitz* and is at odds with at least the Third[5], Ninth[6], and Tenth Circuits.[7] By requiring no evidence

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[4] *Kiehn v. United States*, 984 F.2d 1100, 1106 (10th Cir. 1993) (No discretion to not undertake emergency rescue when prescribed by Concession Permit's Operation Plan and Emergency Medical Services Guidelines); *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) (No discretionary function immunity when Air Traffic Control Specialist fails to abide by Flight Service Manual's requirement to timely provide private pilot with accurate weather information).

[5] *Fisher Bros. Sales, Inc. v. United States*, No.s 93-1182, 1205-09 (3d Cir. Feb. 25, 1994), *see*, discussion *infra* at p. 8; *see*, also, *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) ("Where the conduct of the government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function.' ")

[6] *Summers v. U.S.*, 905 F.2d 1212, 1215 (9th Cir. 1990) ("a governmental failure to warn is not necessarily shielded from suit simply because a discretionary function is in some way involved. On the contrary, we have concluded that 'where the challenged governmental activity involves' safety considerations under an established policy rather than the balancing of competing policy considerations, the rationale for the 'exception falls away and the U.S. will be responsible for the negligence of its employees.' "); *ARA Leisure Services v. U.S.*, 831 F.2d 193, 195 (9th Cir. 1987) (same – Park Service's failure to maintain roadway does not involve "balancing of competing policy considerations.").

[7] *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992) ("We fail to see how the determination in this case can be labeled a policy decision. The choice was governed, as plaintiffs contend, by 'objective principles' of electrical engineering").

whatsoever that a government employee's *failure to act was indeed policy-based,* the Eleventh Circuit is in direct conflict with the standard required by the Sixth Circuit.[8]

Petitioners do not seek a *bright line test* for what is or is not sufficiently specific or mandatory to deprive governmental actors of discretion. Given the myriad situations in which government employees act, this would be impossible. However, the other circuits' opinions provide a relative range of *Gaubert's* limits, beyond which the Eleventh Circuit travelled in the instant case. By merely dismissing these cases as "inapposite", the government avoids confronting the very essence of this controversy. By failing to substantively analyze how or why the circuits are split, the government implicitly concedes that *Autery* is indefensible.

II.

Since release of the Eleventh Circuit's opinion below, it has been cited six times – twice in cases with substantively similar governmental policy mandates concerning inspection and testing but with the opposite results[9]; once

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[8] *Myers v. United States,* No.s 92-5812, 5813, 5814, 5816 (6th Cir., March 1, 1994) (*see,* discussion *infra* at p. 9).

[9] In *Appley Bros. v. U.S.,* 7 F.3d 720, 725 (8th Cir. 1993), a failure by U.S.D.A. grain inspectors to abide by mandatory requirements in checking for and reporting warehouse shortages was *not* immunized under the FTCA. The Eighth Circuit found no discretion to not act. However, the court interpreted *Autery* to mean a *"general guideline* [is] insufficient to deprive the federal government of the protection of the discretionary function exception".

See, also, *Barton v. American Red Cross,* 829 F.Supp. 1290, 1312-13 (M.D.Ala. 1993), which extends *Autery* to the realm of

as drawing "an important distinction between those acts of government actors that embody public policy and those that are merely everyday decisions void of any public policy implications."[10]; and in three other cases.[11]

Because the Eleventh Circuit's opinion in *Autery* cannot be reconciled with the other circuits' opinions, and is now being erroneously followed, it is clear the government is wrong in asserting (Br. at p. 7) that *Autery* "is consistent with decisions of other courts of appeals on similar facts." In fact, since this petition was filed, two more recent federal courts of appeals' opinions have been

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official federal employee immunity and cautions courts "not to forge a fact-based inquiry into the circumstances surrounding the government actor's exercise of a particular discretionary function, but [to] instead look to the nature of the challenged decision in an objective, or general sense and ask whether that decision is one which a reasonable person would expect inherently to be grounded in considerations of policy." The court found no discretion in the Red Cross Director's performance of HIV test on donors' blood "although the performance of the test may involve some judgment, that judgment is not grounded in setting the Red Cross's regulatory policy."

[10] *See, Redland Soccer Club v. Dept. of Army*, 835 F.Supp. 803, 806-7 (M.D.Pa. 1993).

[11] *See, Powers v. U.S.*, 996 F.2d 1121, 1124-5 (11th Cir. 1993) (finding Congress' use of the word "*shall*" in 42 U.S.C.A. § 4020 afforded the Director of FEMA "discretion to decide when and how best to make information and data available to the public regarding federally subsidized flood insurance."); *Bowan v. United States*, Ms. 90-1123-Civ-J-20 (M.D. Fla., March 30, 1994) ("The relevant inquiry is whether the controlling statute or regulation mandates that a government agent perform his or her function in a specific manner."); *Mesa v. United States*, 837 F.Supp. 1210 (S.D.Fla. 1993).

released which appear to be in direct conflict on the discretionary function immunity issue. In both these cases the courts of appeals found no discretion to not inspect or test because such conduct is not "based in policy".

For example, in *Fisher Bros. Sales, Inc. v. United States*, Case No.s 93-1205, -1206, -1207, -1208, -1209 (3d Cir. Feb. 25, 1994), growers and exporters of Chilean fruit and domestic importers brought an action under the FTCA alleging that Chilean grapes were negligently tested by an FDA laboratory, that the tests falsely showed the presence of cyanide, and that they were damaged by the resulting removal of all Chilean fruit from the market. In rejecting the government's discretionary function immunity defense, the Third Circuit stated:

> "Even were we to find that the lab technicians had discretion as to the manner in which they tested the grapes, it is apparent that it was not the sort of discretion Congress meant to protect . . . Judgment guided purely by scientific or other objective principles does not involve discretion for purposes of the discretionary function exception."

Id. at p. 6. In the instant case, the only "choice" the Park Service's employees were to make was whether a tree was located within a specified height/distance from an area of heavy sustained visitor use. At best this was a choice to be made using scientific or objective principles. Once made, the employees were required by the THMP to do on-foot walkaround inspections of the trees at least annually. According to the Third Circuit in *Fisher Bros.*, these sorts of "judgments" do not involve discretion "for purposes of the discretionary function exception."

In another failure to inspect case, *Myers v. United States*, No.s 92-5812, -5813, -5814, -5816 (6th Cir. March 1, 1994), survivors of miners killed in an explosion brought an FTCA action against inspectors from the Mine Safety & Health Administration. Finding no discretionary function immunity, the Sixth Circuit stated:

> "Plaintiffs contend that the MSHA inspectors should have found, but failed to find, the existence of certain safety violations and, if they had, the deaths of these miners would have been prevented. As the court in *Berkovitz* held, the applicability of the discretionary function exception in such situations turns on whether the MSHA inspector is authorized to make such assessments as a matter of public policy, or whether those determinations are supposed to be the product of more objective criteria. We hold that neither the Act nor the MSHA regulations authorize mine safety inspectors to conduct their inspections on the basis of 'social, economic or political policy.' "
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> * * *
>
> "[T]he choices inherent in these assessments are to be made by MSHA inspectors in light of their own observations, informed by professional judgment and knowledge of the industry. Considerations of 'political, social or economic policy' are not authorized to play a part in these assessments."

Id. at pp. 7-8. By analogy, the Park Service's employees were charged only with determining whether "hazardous" trees were within a specified height/distance from a high visitor use area. These decisions were not grounded in policy any more than the MSHA mine inspectors' decisions were. The Park Service's maintenance personnel were not to balance "political, social or economic

concerns" while inspecting for trees; rather, they were to make the objective determination of whether a tree fell within some proximity to a heavy visitor use area. Upon such a finding, the Park Service's policy required at least annual on-foot, "walk-around" inspections of those trees. It remains undisputed that had that been done, this tree would have been eliminated.

The Eleventh Circuit found that the Park Service's failure to make the required tree inspections *was susceptible* to policy analysis because "the Park Service *likely* had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available." Pet. App. 21a. However, as noted (Pet. at 15-7), the government presented absolutely no evidence at trial from which the Eleventh Circuit might have drawn this speculative conclusion. Instead, the court held that immunity exists, in a failure-to-act case, even without any proof that the failure to act was indeed grounded in policy. According to *Berkovitz* and the circuit courts of appeals' opinions cited herein, these types of failures to act are not policy-based in any event.

CONCLUSION

Petitioners have shown the clear splits in authority among the circuits. The sheer volume of judicial resources spent analyzing discretionary function issues begs for further clarification. A Westlaw query reveals that, in the three years since this Court decided *Gaubert*, the lower federal courts have released 133 discretionary function opinions. Because *Autery* has now essentially

undermined the FTCA in the Eleventh Circuit, this Petition should be granted.

Respectfully submitted,

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APPENDIX G

[PLAINTIFFS' EX. A-1; R3-38]